Nos. 93-356 and 93-521

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Respondents.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF JOINT RESPONDENTS IN SUPPORT OF PETITIONERS

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RULE 29.1 STATEMENT

The Association for Local Telecommunications Services ("ALTS") is a non-profit national trade organization representing the competitive access industry. ALTS' members include over 25 competitive access providers ("CAPS") operating as nondominant carriers, which deploy independently financed networks using state-of-the-art technologies to serve the needs of interexchange carriers (IXCs) and users in over 45 metropolitan areas across the country.

The Competitive Telecommunications Association ("CompTel") is a trade association of approximately 120 common carriers providing domestic and international long distance telecommunications services, and their suppliers. CompTel has not issued shares or debt securities to the public. CompTel does not have any parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Sprint Communications Company L.P. ("Sprint") is a limited partnership organized for the purpose of engaging in the provision of domestic and foreign telecommunications. Sprint is wholly owned by subsidiaries of Sprint Corporation (formerly United Telecommunications, Inc.), a publicly traded corporation.

The following affiliates of Sprint have issued shares or debt securities to the public: Carolina Telephone and Telegraph Company, United Telephone Company of Florida, United Telephone Company of Ohio, United Telephone Company of Pennsylvania, United Inter-Mountain Telephone Company, Centel Corporation, Central Telephone Company, and Centel Capital Corporation.

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BRIEF OF JOINT RESPONDENTS IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

The Association for Local Telecommunications Services, the Competitive Telecommunications Association, and Sprint Communications Company L.P., herein "Joint Respondents," hereby submit their brief in support of Petitioners urging reversal of the decision of the United States Court of Appeals for the District of Columbia Circuit. The Joint Petitioners adopt the questions presented

and statements of jurisdiction set forth in the petitions for *certiorari* in these consolidated cases.

STATEMENT OF THE CASE

Beginning in the late 1960s, technological advances brought about the previously unanticipated feasibility of competition in the long-distance portion of telephone service. The Federal Communications Commission ("FCC" or "Commission") determined that the congressional policy expressed in the Communications Act could best be carried out by permitting and encouraging such competition.

As competition developed, the FCC determined as a matter of policy to distinguish between two classes of communications common carriers: dominant and nondominant.[1] AT&T, which carried virtually all long distance traffic until the late 1970s and still controls at least 60 percent of the long distance market,[2] was classified as dominant, while MCI, Sprint, and numerous other small long distance and local access companies have been classified as nondominant. The FCC determined, again as a matter of policy, to apply more rigorous tariff regulation to dominant carriers than to nondominant carriers in light of the public interest in containing the market power of the dominant carriers.[3]

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[1] *In re Policy and Rules Concerning Rates for Competitive Common Carrier Serv. and Facilities Authorizations Therefor*, 77 F.C.C.2d 308, 309 (1979) (*"Competitive Carrier Notice"*); *In re Policy and Rules Concerning Rates for Competitive Common Carrier Serv. and Facilities Authorizations Therefor*, 85 F.C.C.2d 1, 20-22 (1980) (*"First Report and Order"*).

[2] Federal Communications Commission, *Long Distance Market Shares: Third Quarter, 1992* (Staff Report, Rel. Jan. 8, 1993).

[3] *Competitive Carrier Notice*, 77 F.C.C.2d at 313-14, 358-59; *First Report and Order*, 85 F.C.C.2d at 1-12; *In re Policy and Rules Concerning Rates for Competitive Carrier Serv. and Facilities Authorizations Therefor*, 91 F.C.C.2d 59, 59-73 (1982) (*"Second Report and Order"*), *recons. denied*, 93 F.C.C.2d 54 (1983).

AT&T has long been unhappy with this regulatory regime because, under it, AT&T is regulated more closely than its competitors. AT&T has therefore maintained steady pressure on the FCC in an effort to undermine or overturn this regulatory structure.[4] AT&T continually sought nondominant treatment from the FCC.[5] But, failing to achieve that objective, and after permissive detariffing had been in place for seven years, AT&T decided to challenge the FCC's tariffing policy as applied to nondominant carriers. The vehicle AT&T selected for that challenge was an administrative complaint at the FCC against its largest competitor, MCI.

The FCC recognized AT&T's complaint as an attack on its permissive detariffing policies, and chose to consider that attack in the context of rulemaking rather than adjudication. AT&T sought judicial review of that choice and obtained instead a ruling that the permissive detariffing policy itself was unlawful. The FCC's contemporaneous reaffirmation in rulemaking of its permissive detariffing policy was then summarily reversed by the Court of Appeals for the District of Columbia Circuit in reliance on its earlier decision that permissive detariffing was unlawful. The lawfulness of permissive detariffing under section 203 of the Communications Act of 1934, *as amended* 47 U.S.C. § 203 (1988 & Supp. 1991), is now before this Court on *certiorari*.

Section 203(a) requires, *inter alia*, that common carriers "shall file" with the FCC schedules showing the interstate and foreign communications services which they offer and the rates which they charge for such services. However, section 203(b)(2) empowers the FCC "in its discretion and for good cause shown" to "modify any re-

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[4] *See, e.g., In re Competition in the Interexchange Marketplace*, 6 F.C.C.R. 5880 (1991) (granting AT&T greater regulatory flexibility in the offering of some types of services, including contract offerings with large business users).

[5] *See, e.g.*, AT&T comments in FCC CC Docket Nos. 83-1147, 86-421, 87-313, 90-132, 92-143, and 93-197.

quirement" of section 203 (with one exception, *see* p. 18 *infra*) "either in particular instances or by general order applicable to special circumstances or conditions." The FCC's tariff forbearance rule adopted in the *Rulemaking Order* at issue [6] modified the tariff filing requirement by permitting nondominant carriers (*i.e.*, carriers lacking in market power) subject to forbearance regulation to offer their domestic services without filing tariffs.

A. Evolution Of The Permissive Detariffing Policy

Permissive detariffing had its genesis almost fifteen years ago when, in 1979, the FCC initiated its *Competitive Carrier* rulemaking proceeding [7] to adjust its regulatory policies to reflect the emergence of nascent competition in the telecommunications industry. Prior to the 1970s, virtually all interstate communications services were provided by AT&T through its then-existing Bell System Operating Companies and in cooperation with independent telephone companies. *In re Tariff Filing Requirements for Interstate Common Carriers,* 7 F.C.C.R. 8072 (1992); Pet. App. 5a. However, in the 1970s, due in large part to advances in technology and FCC decisions finding that competitive entry would further the fundamental purposes of the Communications Act, new carriers began to offer various types of communications services and to compete, for the first time, in the monopoly preserve of AT&T.

Unlike AT&T, its Bell System subsidiaries, and other traditional providers of local exchange services, these emerging competitive carriers did not possess and could not exercise market power. Thus, the FCC found that the application of tariffing rules developed to regulate monopoly carriers was not necessary to ensure compliance by

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[6] *In re Tariff Filing Requirements for Interstate Common Carriers,* 7 F.C.C.R. 8072 (1992) (*"Rulemaking Order"*); Pet. App. 3a-36a.

[7] *In re Policy and Rules Concerning Rates for Competitive Common Carrier Serv. and Facilities Authorizations Therefore,* CC Docket No. 79-252 (1979).

the new competitive entrants with the substantive requirements of the Comunications Act. Relying upon well-established economic principles, the FCC determined that there was no real danger that these new carriers entering the telecommunications market, given their lack of market power, would be able to commit any of the harms against which the traditional tariffing rules were intended to guard. These firms could not charge excessive prices or collect monopoly rents, could not engage in predation against the dominant firm as a realistic market strategy, and would have no incentive or ability to engage in unlawful discrimination. In short, these carriers would not be able to violate sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b) and 202(a) (1988). *See In re Policy and Rules Concerning Rates for Competitive Common Carrier Serv. and Facilities Authorizations Therefor,* 77 F.C.C.2d 308, 334-338 (1979) (*"Competitive Carrier Notice"*); *In re Policy and Rules Concerning Rates for Competitive Common Carrier Serv. and Facilities Authorizations Therefor,* 85 F.C.C.2d 1, 31-33 (1980) (*"First Report and Order"*).

In these circumstances, it was further apparent that continued application of the dominant carrier regulatory scheme to carriers without market power would, as a policy matter, serve no purpose. On the contrary, such a requirement might make matters considerably worse. Apart from the useless paperwork involved, applying traditional dominant carrier regulation to carriers without market power would interfere with the workings of an emerging competitive marketplace by, for example, discouraging price cuts or facilitating collusion. This interference, the agency found, could impede the progress of competition itself and thus directly conflict with the FCC's overriding statutory mandate "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151 (1988).

In order to avoid these consequences, the FCC was understandably anxious to modify to the maximum extent unnecessary tariff and other regulation of carriers without market power. Nonetheless, the FCC moved cautiously and carefully. Initially, in its *First Report and Order* in *Competitive Carrier*, the FCC established dominant/nondominant carrier classifications and simply streamlined some of the paperwork burdens associated with the then-prevailing tariff and entry/exit rules for nondominant carriers. 85 F.C.C.2d at 3.

Shortly thereafter, in *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 84 F.C.C.2d 445 (1981) ("*Further Notice of Proposed Rulemaking*"), the FCC proposed more substantial modifications of its regulation of nondominant carriers, including a proposal to "forbear" from requiring such carriers to file tariffs with the FCC. The FCC discussed at length the perverse effects and the harm to consumer welfare of imposing a tariff filing requirement upon carriers without market power. It explained that such requirement "is superfluous as a consumer protection device, since competition circumscribes the prices and practices of [nondominant] companies," *id.* at 479; that it slows the introduction of new and innovative services, *id.* at 471; and that it "stifles price competition." *Id.* at 479. The FCC recognized that "[f]orbearance discretion . . . must be exercised upon some well-defined bases which can be measured against the overall statutory goals and mandates of the Communications Act." *Id.* at 472. However, it tentatively concluded that the adverse consequences of tariff regulation applied to carriers without market power "frustrate the underlying purposes of the [Communications] Act," *id.* at 478, and that, accordingly, the exercise of forbearance discretion with respect to section 203 was fully justified. It further tentatively concluded upon analysis of section 203, and in particular, the modification powers granted under section 203(b)(2), that it

had "ample authority to remove the requirement of tariff filings where appropriate." *Id.* at 479.

In 1982, in the *Second Report and Order* issued in the *Competitive Carrier* proceeding, the FCC concluded that it had discretionary forbearance authority "when such forbearance furthers statutory purposes and the public interest." *In re Policy and Rules Concerning Rates for Competitive Common Carrier Serv. and Facilities Authorizations Therefor*, 91 F.C.C.2d 59, 62 (1982) ("*Second Report and Order*"), *recons. denied*, 93 F.C.C.2d 54 (1983). It also found that its proposal to forbear from requiring nondominant carriers to file tariffs was appropriate. 91 F.C.C.2d at 65.

Proceeding in an incremental manner, the FCC determined in the *Second Report and Order* that only domestic resale carriers (*i.e.*, carriers that do not own facilities) would be eligible for permissive detariffing. Forbearance regulation, including permissive detariffing, was then extended to certain nondominant facilities-based carriers, such as Sprint and MCI, when the FCC issued *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 95 F.C.C.2d 554 (1983) ("*Fourth Report and Order*"). The FCC's decision was based upon the FCC's three years of experience with reviewing the tariffs of such carriers under streamlined regulation which revealed "no evidence that it is in the public interest . . . to continue receiving streamlined tariff . . . filings from [facilities-based nondominant carriers] to prevent them from charging unjust or unreasonable rates . . . ." *Id.* at 578. Thereafter in 1984, the FCC applied forbearance regulation to virtually all remaining nondominant carriers. *In re Policy and Rules Concerning Rates for Competitive Common Carrier Serv. and Facilities Authorizations Therefor*, ("*Fifth Report and Order*"), 98 F.C.C.2d 1191 (1984), *recons. denied*, 59 Rad. Reg. 2d (P & F) 543 (1985).[8]

[8] Subsequently, in the *Sixth Report and Order*, the FCC went further and required all nondominant carriers to cease filing

Neither AT&T nor any other party sought judicial review of the FCC's decisions in *Competitive Carrier* adopting and extending the policy of permissive detariffing. In fact, AT&T argued that the policy was lawful both before the FCC and in court. *See In re Policy and Rules Concerning Rates for Competitive Common Carrier Serv. and Facilities Authorizations Therefor*, 99 F.C.C.2d 1020, 1027 (1985) (*"Sixth Report and Order"*); *MCI Telecommunications Corp. v. FCC*, 799 F.2d 773 (D.C. Cir. 1986); Br. for Intervenor AT&T Information Systems Inc. at 41-42.

B. The MCI Complaint Proceeding

On August 7, 1989, despite AT&T's previously-held position favoring the lawfulness of permissive detariffing, AT&T filed an administrative complaint with the FCC against MCI. AT&T alleged that MCI was providing service to certain customers at rates and upon terms and conditions which were not set forth in MCI's tariffs and that MCI was, therefore, in violation of section 203. MCI admitted that it was providing non-tariffed service, but argued that under the FCC's permissive detariffing policy, it was allowed to provide service on a non-tariffed basis.

MCI moved to dismiss AT&T's complaint and AT&T moved for summary decision on the ground that MCI had admitted AT&T's principal allegation. In October 1991, after more than two years had elapsed without decision

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tariffs and remove those tariffs already on file. The decision was appealed by MCI to the Court of Appeals for the District of Columbia Circuit, which reversed the FCC's decision forbidding nondominant carriers from filing tariffs. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). However, the D.C. Circuit specifically noted that "in so ruling" it did "not reach the question whether the FCC's earlier permissive orders are invalid." *Id.* at 1196. Thus, the FCC's permissive detariffing policy continued to remain in effect, and most nondominant carriers, in reliance upon that policy, elected not to file tariffs.

by the FCC on AT&T's complaint, AT&T petitioned the D.C. Circuit for a writ of *mandamus* asking that the court direct the FCC to resolve the complaint. In response to the petition, the FCC announced that it would conclude its investigation by the end of January 1992, and the court thereafter dismissed AT&T's petition. *See American Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 731 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993); Pet. App. 43a.

On January 28, 1992, the FCC released its *Memorandum Opinion and Order* in the AT&T complaint proceeding. *AT&T Communications v. MCI Telecommunications Corp.*, 7 F.C.C.R. 807 (1992); Pet. App. 57a-67a. The FCC denied that portion of AT&T's complaint that sought damages for MCI's "past conduct in offering service at rates and on terms and conditions not contained in tariffs filed with the Commission." 7 F.C.C.R. at 808; Pet. App. 63a. The FCC concluded that "MCI's conduct . . . complied with what the Commission in the *Fourth Report and Order* [in *Competitive Carrier*], has said MCI may do," 7 F.C.C.R. at 809; Pet. App. 63a, and that "[i]t would be manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability." 7 F.C.C.R. at 809; Pet. App. 64a.

C. The Rulemaking Proceeding

The FCC also dismissed that portion of AT&T's complaint that sought "prospective relief enjoining MCI from providing off-tariff services." *Id.* The FCC concluded that AT&T's complaint was, "in practical effect a challenge to the Commission's previously adopted and effective forbearance rule;" that such rule "has been in place for almost ten years" and "represents one of the cornerstones of our regulation of the long-distance industry;" that "[a]ny change in this fundamental policy would have a significant impact on a broad range of customers and

providers of telecommunications services across the nation;" and, that a general rulemaking in which "all interested parties will have an opportunity to comment," would permit the FCC to address permissive detariffing "as it applies to all nondominant carriers and to consider and implement any changes on an industry-wide basis. *Id.* at 809; Pet. App. 65a. The FCC, therefore, simultaneously instituted a rulemaking proceeding to consider the issue of permissive detariffing for nondominant carriers. *In re Tariff Filing Requirements for Interstate Common Carriers,* 7 F.C.C.R. 804 (1992).

On November 5, 1992, the FCC announced that it had adopted the *Rulemaking Order* at issue in this case and had concluded that its tariff forbearance rules are lawful and serve the public interest. On November 25, 1992, the FCC released the text of this *Order* and set forth a detailed analysis of the basis for its conclusion. The FCC found that although the language of section 203(a) states that "every" carrier "shall" file tariffs and the language of section 203(c) states that "no carrier . . . shall" provide service unless tariffs have been filed, the language of section 203(b)(2) "limits those commands." 7 F.C.C.R. at 8075; Pet. App. 13a. The FCC explained that under section 203(b)(2), it is granted the authority to modify any requirement of section 203 with the exception of expanding the 120-day tariff notice period set forth in section 203(b)(1). The FCC concluded that "this specific, narrow limitation on the Commission's modification power strongly suggests that Congress did not otherwise intend to limit our authority, upon a proper public interest showing, to alter the requirements of Section 203." 7 F.C.C.R. at 8075; Pet. App. 13a-14a.

Moreover, the FCC found that Congress had "acquiesced in the FCC's present forbearance rules." 7 F.C.C.R. at 8077; Pet. App. 22a. The FCC pointed out that "in its recent enactment of the TOCSIA [Telephone Operator Consumer Services Improvement Act of 1990, ch. 652,

Pub. L. No. 101-435, 104 Stat. 987, *as amended* Pub. L. No. 101-555, 104 Stat. 2760 (1990) codified in 47 U.S.C. § 226 (Supp. 1991)], Congress has demonstrated its awareness of the Commission's forbearance policy and made no attempt to disturb it." 7 F.C.C.R. at 8077; Pet. App. 23a. On the contrary, the FCC noted that Congress modified the FCC's authority "to forego requiring tariffs for a small subset of common carrier services" while leaving such authority for the remaining services offered by nondominant carriers "intact." 7 F.C.C.R. at 8078; Pet. App. 23a. Consequently, the tariffing requirement imposed by TOCSIA "would be mere surplusage if Congress believed that the FCC had incorrectly interpreted Section 203 as allowing permissive detariffing." 7 F.C.C.R. at 8078; Pet. App. 24a.

The FCC reaffirmed its *Competitive Carrier* finding that permissive detariffing "furthers the statutory purposes of the Communications Act." 7 F.C.C.R. at 8078; Pet. App. 26a. Specifically, the FCC explained:

> We also continue to believe that altering our forbearance policy would frustrate the overriding goals of the Act. We agree with those commenters that argue that the purposes of the Act would be thwarted if the Commission were to reimpose full tariff regulations on competitive, nondominant carriers that provide services in a working market. We agree with those parties that assert that the forbearance policy developed in the *Competitive Carrier* decisions has played a major role in the rapid development of competition and in the consumer benefits that have resulted. Moreover, the record here confirms that but for permissive detariffing, at least some of the current telecommunications market participants likely would not have entered into the competitive fray at all.
>
> We conclude that permissive detariffing has proven to be a success over the years, as evidenced by the robust competition in the interexchange market and

> the increased choices for customers with respect to carriers and prices. The decade of actual experience under permissive detariffing provides further confirmation of the success of that approach in furthering the statutory goals of the Communications Act. In 1982, approximately a dozen long distance carriers operated within the United States. By March 1992, there were an estimated 482 such carriers purchasing switched access from local exchange carriers. Given this evidence, we believe it is clear that our permissive detariffing rules have allowed for new entrants into the interexchange market and have given consumers more flexibility with respect to the price of services, type of services, and selection of carriers. To adopt a different course of action at this time would only frustrate the success of our current policy.

7 F.C.C.R. 8079-8080 (footnotes omitted); Pet. App. 28a-30a.

D. The D.C. Circuit's Ruling In The MCI Complaint Proceeding

During the pendency of the rulemaking proceeding, AT&T petitioned the D.C. Circuit for review of the FCC's decision on AT&T's complaint against MCI. On November 13, 1992—eight days after the FCC had announced that it had adopted its *Rulemaking Order* but twelve days before the release of the text of that *Order*—the D.C. Circuit issued its decision on AT&T's petition for review in the MCI complaint proceeding. 978 F.2d 727. The court reversed and remanded the FCC's decision on AT&T's complaint in an opinion that was highly critical of the FCC's handling of that case. The court specifically noted the amount of time it had taken the FCC to reach its decision and the FCC's failure "to decide forthrightly the issue before it." *Id.* at 731; Pet. App. 43a. It found that the FCC had an obligation to decide the AT&T allegation that MCI was acting illegally in providing service on an off-tariff basis in the complaint

proceeding and that the FCC's decision instead to defer consideration of such issue to a rulemaking proceeding amounted to "a sort of administrative law shell game." 978 F.2d at 731-732; Pet. App. 44a.

Rather than confining itself to reviewing the FCC's decision on AT&T's complaint, the court went on to decide the lawfulness of the FCC's permissive detariffing policy, despite the fact that it did not have before it the FCC's most recent position as to the validity of its policy. The court did not take issue with the policy concerns expressed by the FCC in *Competitive Carrier*. It stated:

> We understand fully why the Commission wants the flexibility to apply the tariff provisions of the Communications Act to AT & T, which the Commission regards as the dominant carrier, differently from the way it applies the tariff provision to other competing carriers. We do not quarrel with the Commission's policy objectives. But the statute, as we have interpreted it, is not open to the Commission's construction.

978 F.2d at 736.

Thus, the court concluded that permissive detariffing "is simply not defensible" because section 203(a) requires that all carriers file tariffs. *Id.* at 735; Pet. App. 52a. Although the court conceded that the FCC's position "was not insubstantial when made initially," *id.*, it found that the court's reasoning in its decision in *MCI* v. *FCC* invalidating mandatory detariffing "forecloses the Commission's argument in this case." 978 F.2d at 736; Pet. App. 53a. The court also found (in a footnote) that its opinion was "somewhat buttressed" by this Court's decision in *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990). 978 F.2d at 736, n.12; Pet. App. 53a-54a.

E. The D.C. Circuit's Summary Reversal Of The FCC's Rulemaking Decision Reaffirming Permissive Detariffing

AT&T petitioned the D.C. Circuit for review of the *Rulemaking Order*, and in light of that court's decision in *AT&T v. FCC*, moved for summary reversal. The D.C. Circuit granted AT&T's motion on the ground that its decision in *AT&T v. FCC* "conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of the Communications Act, 47 U.S.C. § 203(a) (1988)." Pet. App. 2a.

This case is now before this Court on petitions for a writ of *certiorari* filed by the United States and the FCC, and by MCI.

SUMMARY OF THE ARGUMENT

The FCC's permissive detariffing policy is lawful under well-established principles of administrative law and statutory construction.

This Court has long recognized the important role that administrative agencies serve in permitting flexible implementation of regulatory statutes in dynamic circumstances. The telecommunications industry of the past two-and-one half decades illustrates graphically the sort of dynamic circumstances in which such flexibility is necessary. Faced with the previously unanticipated technological feasibility of competition in the long distance business, the FCC determined that competition would be good for telecommunications consumers and so adopted policies to encourage competition. This case arises from AT&T's efforts to frustrate the development of competition in a business that it formerly occupied to the exclusion of all others.

Congress gave the FCC the express power to modify the tariffing requirements of section 203 of the Communications Act. The FCC determined to exercise that

power in the permissive detariffing rule under review here on the basis of its finding that to do so would advance the policies mandated by Congress in the Act.

The Joint Respondents' very existence is attributable to the pro-competitive policies that the FCC began implementing in the 1970s. The dramatic expansion in consumer choice and the accompanying reductions in prices for long distance telephone service are ample proof that the FCC's pro-competitive policies fulfill the policy mandate of the Communications Act. Congress's recognition and tacit approval of those policies through the enactment of TOCSIA further confirms that those policies are consistent with the Act. In substituting its construction of section 203 for that of the FCC, the Court of Appeals is at odds with this Court's ruling in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and threatens to frustrate the pro-competitive and pro-consumer policies adopted by the FCC.

Standing virtually alone in its defense of the decision of the Court of Appeals, AT&T (the primary long-distance carrier found dominant and thus not subject to permissive detariffing) relies heavily on *Maislin*. That case, and the "filed rate" doctrine that it reaffirms, have little to do with the matters at issue here. The issue here is not whether a carrier may charge prices inconsistent with its filed rates but rather whether the FCC may permit carriers without market power not to file rates at all. The statutory policies and language of the Communications Act at issue here are fundamentally different from those of the Interstate Commerce Act at issue in *Maislin*.

For all of these reasons, this Court should reverse the decision of the Court of Appeals and hold that the FCC acted within its statutory authority in adopting its permissive detariffing policies and rules.

ARGUMENT

I. THE FCC CORRECTLY DETERMINED THAT THE COMMUNICATIONS ACT AUTHORIZES ADOPTION OF A POLICY OF PERMISSIVE DETARIFFING.

A. Both The Language And Legislative History Of The Communications Act Make It Clear That Permissive Detariffing Is Not Foreclosed To The Commission As A Reasonable Policy Alternative.

Permissive detariffing is centrally important to the FCC's efforts to regulate, consistently with the public interest, an increasingly competitive telecommunications marketplace. In the *Rulemaking Order* summarily struck down by the D.C. Circuit, the FCC found that "the purposes of the Act would be thwarted if the Commission were to reimpose full tariff regulations on competitive, nondominant carriers that provide services in a working market;" that "the forbearance policy developed in the *Competitive Carrier* decisions has played a major role in the rapid development of competition and in the consumer benefits that have resulted;" and, that "the record here confirms that but for permissive detariffing, at least some of the current telecommunications market participants likely would not have entered into the competitive fray at all." 7 F.C.C.R. at 8079; Pet. App. 28a-29a. These findings are clearly matters of agency expertise and are basically unchallenged either by the Court of Appeals or by the parties to this proceeding.

On the contrary, in its decision in *AT&T v. FCC* that formed the underpinning of its summary reversal of the *Rulemaking Order* and which was otherwise quite critical of the FCC, the Court of Appeals sought to make clear that it did "not quarrel with the Commission's policy objectives." 978 F.2d at 736; Pet. App. 54a. Similarly, AT&T has conceded in a recent filing with the FCC that "direct economic regulation" for carriers such as "ad-

vance tariff review procedures and other constraints" unnecessarily "impedes the 'dynamism' of a competitive market and impose[s] both direct and indirect costs on users." Motion for Reclassification of American Telephone & Telegraph Company as a Nondominant Carrier, filed Sept. 22, 1993 in *Competitive Carrier*, at 16-17 (citing *In re Competition in the Interstate Interexchange Marketplace*, 6 F.C.C.R. 5880, 5895 (1991)).

The single issue in this case is whether the FCC was clearly barred from adopting permissive detariffing—no matter how important or sound—by the specific language of the Communications Act. For the reasons explained below, the Joint Respondents submit that the FCC's reading of the Communications Act as allowing it to adopt permissive detariffing was legally permissible and that such decision, therefore, should not have been summarily struck down by the D.C. Circuit.

It is, of course, well-settled that an agency's interpretation of its enabling statute must be accorded considerable deference. As this Court made clear in *Chevron:*

> If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 843.

A close reading of the applicable provisions of the Communications Act demonstrates that the certainty of legislative intent found by the Court of Appeals to forbid permissive detariffing simply does not exist.

Section 203(a) of the Act provides that "every common carrier . . . shall . . . file with the Commission . . .

schedules showing all charges . . . for interstate and foreign . . . communications . . . ." Section 203(b)(2) then gives the Commission the authority

> in its discretion and for good cause shown, [to] *modify* any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days. (*emphasis added*).

Thus, other than being prohibited from extending the 120-day notice period, the FCC is permitted by section 203(b)(2) to "modify any requirement" in section 203, including the tariffing requirements, in any way that can be deemed reasonable.

The D.C. Circuit determined, nevertheless, that the FCC's power to "modify" the tariffing requirements of section 203(a) was not sufficient to allow the agency to adopt a policy of permissive detariffing. The Court of Appeals, citing its earlier decision in *MCI v. FCC*, found "that the language of Section 203(b) 'suggest[s] circumscribed alterations—not, as the FCC now would have it, wholesale abandonment or elimination of a requirement.' " 978 F.2d at 736; Pet. App. 53a.[9]

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[9] The degree of any circumscription is obviously not specified in section 203(b)(2). It would seem clear as a matter of ordinary usage that "modify" has virtually the same (perhaps exactly the same) meaning as "change" or "alter." Although one definition for "modify" given in *Black's Law Dictionary* 905 (5th ed. 1979) is "to change in incidental or subordinate features," the primary definition is given simply as "to alter." Other synonyms for "modify" used in Black's—"enlarge, extend; amend; limit, reduce" —are equally unspecific. It would seem, therefore, that modifications, alterations, changes, etc., may be small or moderate, or may be severe, marked or dramatic. The word "modify" does not by itself either define or limit the seriousness of the modification.

Given this imprecision, it was plainly open for the FCC, under the test enunciated in *Chevron* to interpret its power to modify

Even assuming, *arguendo*, that the court's reading is correct, and that the term "modify" would not ordinarily warrant "wholesale abandonment or elimination of a requirement," it is obvious that the FCC's policy of permissive detariffing does not come close to eliminating tariff regulation under section 203 of the Act. The FCC only excused carriers without market power from the requirement to file certain (*viz.*, domestic) tariffs. Most long distance traffic (AT&T as a dominant carrier, still carries over 60 percent of this traffic), almost all interstate access traffic (*i.e.*, the access traffic carried by the Regional Bell Companies and other local telephone companies) and all international traffic is still carried, and is still required to be carried, pursuant to FCC tariffs. Certainly, in this sense, the FCC's permissive detariffing policy can reasonably be viewed as a modification, rather than as a "wholesale abandonment or elimination of a requirement." 978 F.2d at 736.

That the FCC may permit *some* traffic to be provided on a nontariff basis is shown by section 203(c)—which follows directly after section 203(b)(2)—and which states that:

> No carrier, *unless otherwise provided by or under authority of this* [*Act*], shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this [Act]. (*emphasis added*).

It would seem apparent that any ability to excuse carriers "under [the] authority" of the Communications Act must reside solely with the FCC. There is no entity other than the FCC itself which has been granted the power by Congress to administer the Communications Act or to determine, at least in the first instance, the rights and

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under section 203(b)(2) as the power to change any tariff requirements therein to any extent so long as such change was reasonable and consistent with the purposes of its enabling statute. The FCC was not "circumscribed" to making only minor changes.

burdens of individual carriers thereunder. Consequently, any reading of section 203(b)(2) that denies the FCC any discretion to allow carriers to provide nontariffed service under any circumstances contradicts the proviso in section 203(c). That proviso plainly contemplates that an exception from the Act's tariff filing requirements will be granted, at least in some instances, and presumably, in the absence of any other logical possibility, will be granted by the FCC.[10]

The fact that Congress intended to grant the Commission broad flexibility in enforcing the tariff filing requirements of section 203(a) of the Act is also shown by the legislative history and passage of TOCSIA in 1990 and the concomitant amendment of the Communications Act in accordance with this legislation. The TOCSIA legislative history demonstrates that Congress was well aware of the Commission's long-standing policy of permissive detariffing for nondominant carriers and the dichotomy that the Commission had drawn between nondominant and dominant carriers for regulatory purposes.

Notwithstanding this knowledge, the concern of Congress about the Commission's policy of permissive detariffing was limited to the Commission's treatment of a particular class of nondominant common carriers—Operator Service Providers ("OSPs"). There had been many complaints about the high rates charged by OSPs and Congress sought to remedy the problems that had arisen by imposing new obligations upon OSPs through legislation. This legislation required, *inter alia*, that OSPs submit so-called "informational tariffs" which could be filed on the first day that the "changed rates, terms or conditions" contained in the "informational tariffs" became effective. *See* 47 U.S.C. § 226(h)(1)(A) (Supp. 1991).

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[10] The unlimited modification power granted the FCC was examined and curtailed by Congress in 1976, but only in one respect—the FCC could not extend the notice period for filing tariffs beyond the notice period specified in section 203 (now 120 days).

In addition, the new legislation allowed the Commission to waive any requirements that the OSPs file "informational tariffs" after an initial period of four years following the date of the enactment of section 226. *See* 47 U.S.C. § 226(h)(1)(B) (Supp. 1991). In effect, the new legislation imposed tariffing requirements upon OSPs which overrode permissive detariffing, but only for a particular class of common carriers for which a problem had arisen. As the Commission stated in its *Rulemaking Order*, 7 F.C.C.R. at 8077-8078; Pet. App. 22a-25a, the tariffing requirements imposed on the OSPs under TOCSIA are not as stringent as the tariffing obligations imposed under section 203(a). Section 6 of the Report of the Senate Committee on Commerce, Science and Administration states that:

> While the FCC is charged with the responsibility for determining how detailed these informational tariffs [filed by the OSPs] must be, the Committee does not expect that these informational tariffs would require the same amount of supporting documentation as required of most dominant carriers. For instance, the Committee does not expect that the OSPs will be required to comply with all the requirements of Part 61 of the FCC's rules.[11]

S. REP. No. 439, 101st Cong., 2d Sess. (1990), *reprinted in* U.S.C.C.A.N. 1577, 1599.

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[11] Part 61 of the FCC Rules, 47 C.F.R. Part 61 (1992), sets forth the procedural and substantive tariffing requirements established by the FCC. In the same Senate report, the Regulatory Impact Statement states that:

> This legislation requires all operator services companies to file "informational tariffs" with the FCC. The informational tariffs are necessary to allow the FCC to monitor the rates of OSPs and to determine whether competition in this market is benefiting the consumer. While this will increase the paperwork burdens faced by these companies and the FCC, these informational tariffs are not expected to contain the same detailed cost justification material that typically accompanies the tariffs filed by dominant carriers. S. REP. No. 439 at 1585.

Both the Senate Report and a House Report issued by the Committee on Energy and Commerce [12] make it clear that, other than treating problems associated with OSPs, Congress intended to make no change in the Commission's policy of voluntary forbearance. The House Report states, in particular, that it was not the intention of Congress in the new legislation "to change the filing requirements for dominant interstate interexchange carriers." H. R. REP. No. 213, 101st Cong., 1st Sess. 1, 14 (1989). This reference to dominant carriers shows that Congress was aware of the FCC's policy of differentiating between dominant and nondominant carriers for purposes of tariff filing requirements.

Apart from the implicit approval of the Commission's forbearance policy and its treatment of nondominant and dominant carriers, the TOCSIA legislation passed and contained in section 226 provides strong support for a reading of section 203 which is sufficiently flexible to allow the Commission to implement a policy of permissive detariffing. Under well-established principles of statutory construction, an act must be read as an integrated whole, but each section must also be read *in pari materia*, so that each section is independently given meaning.

The decision of the Court of Appeals that the FCC had no power to exempt nondominant carriers, including OSPs from the requirement to file tariffs under section 203, leaves sections 226(h)(1)(A) and 226(h)(1)(B) largely redundant. The obligations contained in those sections as applied to common carriers have already been covered by the more stringent requirements of section 203(a).[13] Accordingly, after the passage of the TOCSIA

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[12] H.R. REP. No. 213, 101st Cong., 1st Sess. 1 (1989).

[13] AT&T argues that since section 226(a)(9) defines the term "provider of operator services" to mean not only "any common carrier" but also "any other person determined by the Commission to be providing operator services," sections 226(h)(1)(A) and

legislation, sound statutory construction and the need to give meaning to sections 226(h)(1)(A) and (B) strongly suggest a reading of section 203 which is sufficiently flexible to accommodate the Commission's policy of permissive detariffing.[14]

In its opposition to *certiorari*, AT&T sought to minimize the importance of the TOCSIA legislation by citing the language in section 226(i), which states that:

> Nothing in this section [*i.e.*, the section containing the TOCSIA legislation] shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of [the Act].

AT&T claimed that this section showed that "TOCSIA cannot be read to alter the historic understanding" of the tariff filing requirements in section 203. AT&T's Br. in Opposition at 18. AT&T's argument is hardly persuasive. As shown, to the extent there was a "historic understanding" of the FCC's power to modify the re-

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(B) are needed to provide a requirement for "informational tariffs" for any "non-common carriers." However, sections 226(h)(1)(A) and (B) are not limited to non-common carriers. The sections are surplusage (under the court's reasoning) insofar as it covers common carriers and includes a requirement that common carriers file "informational tariffs." To fit sections 226(h)(1)(A) and (B) together with AT&T's reading of section 203, Congress would have had to limit that section so that it applied only to non-common-carrier OSPs.

[14] As a matter of abstract logic it could be argued that sections 226(h)(1)(A) and (B) could be given meaning if it were assumed that Congress was seeking to exempt OSPs from the requirements of section 203(a) and impose lighter burdens on OSPs than any other dominant or nondominant carriers. The difficulty with such argument is that it is belied by the legislative history of TOCSIA. Even a rudimentary review of that legislative history makes it clear that Congress intended to add requirements for the regulation of OSPs to remedy the difficulties that had arisen in the provision of operator services.

quirements of section 203, it was that established by the FCC in *Competitive Carrier*. There, the agency set forth its position that it had the power to implement permissive detariffing; that interpretation stood for approximately eight years at the time TOCSIA was enacted. The statement in section 226(i) is therefore a further affirmation by Congress that it did not intend in TOCSIA to override existing FCC interpretations of other sections of the Communications Act including the FCC's interpretation of its power to modify the requirements of section 203.

B. The Decision Of The Court Of Appeals Is Not Supported By *Maislin*.

In *AT&T v. FCC*, the court stated that its finding that permissive detariffing was violative of the Communications Act is "somewhat buttressed" by this Court's 1990 decision in *Maislin*. However, as shown below, *Maislin* does not address the basic issues now before this Court in this case.

First, *Maislin* does not address the question of permissive detariffing. *Maislin* is basically an affirmation by this Court of a well-established regulatory policy: the "filed rate" doctrine. As this Court stated in *Maislin*:

> This case requires us to determine the validity of a policy recently adopted by the ICC that relieves a shipper of the obligation of paying the filed rate when the shipper and carrier have privately negotiated a lower rate. We hold that this policy is inconsistent with the [Interstate Commerce] Act.

497 U.S. at 119.

The FCC's policy of permissive detariffing does not involve, and is in no way at odds with, the "filed rate" doctrine. The "filed rate" doctrine is, by its terms, limited to a situation in which there is a "filed rate" and where the common carrier charges a shipper or other customer a rate which is different from that "filed rate."

Permissive detariffing involves a situation where an agency grants certain carriers (in this case nondominant carriers) the right to forbear from filing tariffs for certain services. When a carrier chooses under permissive detariffing not to file tariffs, it is axiomatic that there can be no inconsistency with the "filed rate" doctrine. Because there is no "filed rate" there can, by definition, be no divergence between a "filed rate" and the rate the carrier is actually charging. Thus, without a "filed rate" the comparison necessary for a violation of the "filed rate" doctrine simply does not exist.

There is nothing in the *Competitive Carrier* decisions which would allow a carrier to file tariffs and then ignore these tariffs in establishing non-tariffed rates for the same service. On the contrary, the problem of a carrier's rates which conflicted with its tariffs was recognized by the FCC in *Competitive Carrier*. Specifically, in the *Sixth Report and Order*, the FCC allowed a transition period during which carriers declared nondominant would be obligated to remove their tariffs currently on file with the FCC. The agency made it clear that to the extent tariffs remained on file during this period, the carriers whose rates were set forth in those tariffs "must provide . . . services consistent with the tariff until they chose to cancel those tariffs." 99 F.C.C.2d at 1034.[15]

In effect, the rule requiring carriers to adhere to their filed rates is necessary because it would otherwise make a mockery of the tariffing process, creating the opportunity for customer confusion if not deliberate deception, to allow carriers to file rates which may not be correct. But the rule does not speak to whether the filing must be made in the first place. It is no new phenomenon

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[15] As noted, this decision was reversed in other respects in *MCI v. FCC*. However, there was no challenge to the Commission's argument that carriers were not free under *Competitive Carrier* to violate the "filed rate" doctrine.

in the law to say that one is under no obligation to speak, but that if one does speak, it must be truthful.[18]

Second, *Maislin* involves the power of the Interstate Commerce Commission ("ICC") to excuse a carrier's admitted violation of the tariff filing requirements of the Interstate Commerce Act ("ICA"). There is no suggestion in *Maislin* that the ICC had explicit statutory power under the ICA to "modify" the tariff requirements in question.

Although the D.C. Circuit in *AT&T v. FCC* was correct in stating that ICC precedents are "often thought instructive in judicial construction" of the Communications Act, 978 F.2d at 736 n.12; Pet. App. 53a-54a, it is similarly well-established that any such comparison must be undertaken with considerable care. As the Second Circuit noted in *American Tel. & Tel. Co. v. FCC*, 503 F.2d 612, 616 (2d Cir. 1974), "in drafting the Communications Act of 1934 . . . the congressional intent was not to provide a carbon copy of the Interstate Commerce Act." *See also General Tel. Co. v. United States*, 449 F.2d 846, 856 (5th Cir. 1971) ("the functions of the Interstate Commerce Commission . . . are of an entirely different nature than those of the Federal Communications Commission" and "[t]hus we are unwilling to restrict the Federal Communications Commission to a course of action which has been dictated by the requirements of the transportation industry"); *Sea-Land Serv. Inc. v. ICC*, 738 F.2d 1311, 1318 n.11 (D.C. Cir. 1984) (precedents arising under the ICA may be useful to issues before the FCC "by way of analogy only").

In 1978, Congress restructured the ICC's tariff authority in sections 10761 and 10762. At this point, Congress could have modeled the ICC's modification powers on

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[18] It is ironic to note that the other principal basis for the "filed rate" doctrine is the need to preserve "the agency's primary jurisdiction over reasonableness of rates . . . ." *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981) (citations omitted). Here, the FCC has determined that reasonable rates are best assured by eliminating tariffs for nondominant carriers, and yet that determination has been usurped by the court below.

section 203(b)(2). However, Congress chose not to equalize the statutory modification powers of the two agencies and left the ICC with far less power to modify tariff requirements than was granted the FCC. For example, section 10762(d)(1) of the ICA does not give the ICC authority to modify its tariff provisions by "general order" and, unlike section 203(b)(2), may best be considered—as it was by the D.C. Circuit in *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 397 (D.C. Cir. 1986) (*"RCCC"*)[17]—as a provision allowing the ICC to grant "waivers" in appropriate situations.

[17] The differences between the Communications Act and the ICA are shown by the D.C. Circuit's decision in *RCCC*. There is no section in the ICA which is directly comparable to section 203(b)(2) of the Communications Act. The ICC has no power to modify the ICA's tariff filing requirement through the issuance of a "general order", as does the FCC pursuant to section 203(b)(2) of the Communications Act. Rather, 49 U.S.C. § 10762(a)(1) only allows the ICC, in appropriate circumstances, to waive the general tariff filing requirement in 49 U.S.C. § 10762(a) (analogous to section 203(a) of the Communications Act). Moreover, the ICC has no power to waive the prohibition on rebate provision, 49 U.S.C. § 10761(a) (analogous to section 203 of the Communications Act). In *RCCC*, the court determined that the ICC's action "goes beyond 'chang[ing] the . . . requirements of this section,' and nullifies other sections of the [Interstate Commerce] Act for which no waiver authority exists." 793 F.2d at 379. Specifically, the court found that the ICC's action was outside the parameters of its waiver authority in 49 U.S.C. § 10762(d)(1) because, to find otherwise, would also nullify another section of the Act—49 U.S.C. § 10761(a)—"for which no waiver authority exists."

Because the FCC can modify both 203(a) and 203(c), there is no danger that the Commission here is nullifying another section of the Act over which it has no authority. Consequently, both in terms of its modification authority and the fact that such modification authority covers both 203(a) and 203(c), the Communications Act is substantially different from the statute that the Court of Appeals construed in *RCCC*. The Second Circuit recognized that the FCC had been granted more comprehensive modification authority than possessed by the ICC under the ICA in *American Tel. & Tel. v. FCC*, 503 F.2d 612, 617 (2nd Cir. 1974), stating that AT&T's position that section 203(b) confers no greater power than that granted the ICC under the ICA "is simply not so."

Thus, although comparisons between the Communications Act and the ICA are relevant here, it is the difference between section 203(b)(2) and the lesser modification authority granted the ICC under the ICA which is most "instructive." It is difficult to understand why Congress would have deliberately granted the FCC far more sweeping modification powers than the ICC unless Congress intended the FCC to be able to use those powers in a reasonable manner consistent with its statutory responsibilities.

Finally, it is not dispositive in this case that *Maislin* recognizes that tariffs are extremely important. This recognition hardly breaks new ground. Rather, it simply reaffirms and emphasizes long-established regulatory principles that were known to the FCC at the time of *Competitive Carrier*.

There has never been any dispute as to the general importance of tariffs, and *Competitive Carrier* is not inconsistent with this view. The FCC's decision in *Competitive Carrier* is based on the assumption—soundly grounded in economic learning and basically unchallenged in the proceedings below—that nondominant carriers, because of their lack of market power, could not, or were at least highly unlikely to, engage in the unjust, unreasonable, or unduly discriminatory pricing activities forbidden under Title II of the Communications Act. In essence, the Commission weighed the dangers of any diminution of enforcement ability as a result of voluntary forbearance against the substantial harm that would follow as a consequence of mandating that all nondominant carriers file tariffs. The FCC did not relieve dominant carriers, whose market power would give them the ability and incentive to violate sections 201(b) and 202(a) of the Communications Act, of the obligation to file tariffs and such obligation has been maintained to the present time. *Maislin* says nothing about the correctness of the balance drawn by the FCC in *Competitive Carrier* and does not determine the authority of the FCC under the Communi-

cations Act to apply such a balance under section 203 consistent with the modification powers granted to it in section 203(b)(2).

For all these reasons, the Joint Respondents respectfully suggest that *Maislin* provides no real support for the decision of the Court of Appeals in *AT&T v. FCC*—the decision relied upon by the D.C. Circuit in this case to reverse summarily the *Rulemaking Order* at issue.

CONCLUSION

The Joint Respondents respectfully submit that the order of the Court of Appeals should be reversed and the FCC's *Rulemaking Order* affirmed and reinstated.

Respectfully submitted,

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